# STATE OF MICHIGAN

# COURT OF APPEALS

DONNA MARIE SUMINSKI,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant,

and

NORMAN JOSEPH OCHELSKI, SR.,

Defendant.

UNPUBLISHED
February 14, 2008

No. 273947
Oakland Circuit Court
LC No. 2005-067000-NI

Before: Fitzgerald, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Defendant State Farm Mutual Automobile Insurance Company ("defendant") appeals as of right, challenging the trial court's September 15, 2006, opinion and order denying its motion to dismiss, and October 3, 2006, order establishing defendant's liability for uninsured motorist benefits in the amount of $95,000 and awarding plaintiff prejudgment interest and case evaluation sanctions. We affirm.[1]

[1] Plaintiff argues that this Court lacks jurisdiction over this appeal because the trial court's September 15, 2006, order was the final order, and defendant did not timely file its claim of appeal from that order. We disagree. Although the September 15, 2006, order resolved the issue of defendant's liability for uninsured motorist benefits, it did not resolve the extent of defendant's liability. Therefore, it was not a final order within the meaning of MCR 7.202(6)(a)(i). The trial court's October 3, 2006, order was the first order to establish defendant's liability for benefits in the amount of $95,000 and, therefore, qualifies as the first order to dispose of all claims and adjudicate the rights and liabilities of the parties. MCR 7.202(6)(a)(i); *Children's Hosp of Michigan v Auto Club Ins Ass'n*, 450 Mich 670, 677; 545 NW2d 592 (1996). Because defendant filed its claim of appeal within 21 days after entry of the
(continued…)

This lawsuit arises from an automobile accident in which plaintiff's vehicle was rear-ended by a vehicle driven by Norman Ochelski, who was uninsured. Defendant is plaintiff's no-fault insurer. Plaintiff's no-fault policy included coverage for uninsured motorist benefits up to $100,000. In June 2005, plaintiff filed this lawsuit against Ochelski. In October 2005, plaintiff filed an amended complaint adding defendant State Farm as a party and alleging claims for recovery of uninsured motorist benefits.

The matter proceeded to case evaluation and an award was rendered in plaintiff's favor for $85,000, of which $80,000 was attributed to defendant and $5,000 to Ochelski. Plaintiff and Ochelski accepted the evaluation, but defendant rejected it. A judgment was subsequently entered against Ochelski for $5,000, based on the case evaluation.

Plaintiff and defendant thereafter stipulated to adjourn the scheduled trial and participate in case facilitation. In August 2004, the parties participated in settlement discussions and defendant allegedly offered to settle the case for $95,000, representing its policy limits, less a $5,000 setoff for plaintiff's settlement with Ochelski. In a letter dated August 4, 2006, defendant informed plaintiff that its offer "pre-supposes that no release was entered into between [plaintiff] and the third-party driver, Mr. Norman Ochelski." In a separate letter dated August 4, 2006, plaintiff confirmed her acceptance of defendant's offer to settle the case for $95,000. Defendant thereafter disputed its liability for uninsured motorist benefits, taking the position that plaintiff failed to obtain its written consent before settling with Ochelski, contrary to the terms of her policy, thereby precluding coverage for benefits.

Plaintiff subsequently filed a motion to enforce the parties' purported settlement agreement. In response, defendant denied the existence of a binding settlement agreement and further argued that plaintiff's failure to obtain its written consent before settling with Ochelski precluded its liability for uninsured motorist benefits. Defendant requested that plaintiff's lawsuit be dismissed under MCR 2.116(I)(2). The trial court concluded that a binding settlement agreement was not established, but rejected defendant's argument that the policy precluded coverage because plaintiff did not obtain defendant's written consent before accepting the case evaluation against Ochelski. The court concluded that the policy provision at issue did not apply in the context of a settlement involving the acceptance of a case evaluation.

On appeal, defendant renews its argument that it is not liable for coverage for uninsured motorist benefits because plaintiff failed to obtain its written consent before settling with Ochelski, contrary to the terms of her policy. Defendant relies on the following provision in its insurance policy:

> THERE IS NO COVERAGE:
>
> 1. FOR ANY INSURED WHO, WITHOUT OUR WRITTEN CONSENT, SETTLES WITH ANY PERSON OR ORGANIZATION WHO MAY BE LIABLE FOR THE BODILY INJURY.

---

(…continued)

October 3, 2006, order, this Court has jurisdiction over this appeal. MCR 7.203(A)(1); MCR 7.204(A)(1)(a).

"When reviewing an insurance policy, this Court must read the contract as a whole to determine whether the policy is clear and unambiguous on its face." *Linebaugh v Farm Bureau Mut Ins Co*, 224 Mich App 494, 503; 569 NW2d 648 (1997). If a provision in an insurance policy is clear and unambiguous, it must be taken and understood in its plain, ordinary, and popular sense. *Clevenger v Allstate Ins Co*, 443 Mich 646, 654; 505 NW2d 553 (1993). Clear and specific exclusions must be given effect. *Allstate Ins Co v Keillor (After Remand)*, 450 Mich 412, 417; 537 NW2d 589 (1995).

In *Lee v Auto-Owners Ins Co (On Second Remand)*, 218 Mich App 672, 675-676; 554 NW2d 610 (1996), this Court observed:

> Michigan courts have consistently upheld policy exclusions barring recovery of benefits where the insured party releases a tortfeasor from liability without the insurer's consent, recognizing that such a release of liability destroys the insurance company's right to subrogation. A plaintiff's settlement with a negligent motorist or other responsible party destroys the insurance company's subrogation rights under the policy and bars the plaintiff's action for uninsured motorist benefits unless the insurer somehow waives the breach of the policy conditions.
>
> The language of Auto-Owners' policy exclusion is unambiguous and does not contravene Michigan law or public policy. . . . Clear and specific exclusions contained in policy language must be given effect. The exclusion in Auto-Owners' policy must be enforced as written . . . . [Citations omitted.]

In this case, the exclusion in defendant's policy clearly and unambiguously provides that there is no coverage if plaintiff settles with another person without defendant's written consent. Plaintiff's acceptance of the case evaluation with Ochelski was a settlement within the meaning of the policy because it was reduced to a judgment that had the effect of fully adjudicating plaintiff's claim against Ochelski, thereby settling the matter against Ochelski. *Larson v Auto-Owners Ins Co*, 194 Mich App 329, 332; 486 NW2d 128 (1992) ("An accepted mediation evaluation serves as a final adjudication of the claims mediated, and is therefore binding on the parties similar to a consent judgment or settlement agreement.").

Further, we find no support for plaintiff's argument that defendant gave written consent to the settlement with Ochelski. Plaintiff argues that a series of various documents, considered together, reflect defendant's written permission. We disagree. None of the documents even reference the Ochelski settlement, let alone purport to provide defendant's written consent to the settlement.

Nonetheless, we agree with plaintiff that the evidence establishes that defendant waived the written consent requirement. The concept of waiver is discussed in *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 718-719; 179 NW2d 252 (1970):

> To constitute a waiver, there must be an existing right, benefit, or advantage, knowledge, actual or constructive, of the existence of such right, benefit, or advantage, and an actual intention to relinquish it, or such conduct as warrants an inference of relinquishment. There must be an existing right and an

> intention to relinquish it, and there must be both knowledge of the existence of a right and an intention to relinquish it.
>
> A waiver exists only where one, with full knowledge of material facts, does or forbears to do something inconsistent with the existence of the right in question or his intention to rely on that right.
>
> A waiver may be shown by proof of express language of agreement or inferably established by such declaration, act, and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance. [Citations and internal quotations omitted.]

A waiver may be inferably established by the acts and conduct of a party against whom it is claimed. *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 470; 717 NW2d 341 (2006).

Defendant issued the policy and therefore had actual or constructive knowledge of its right to deny coverage if it did not consent to a settlement. Further, on March 31, 2006, the circuit court, pursuant to MCR 2.403(L)(2), mailed a notice to the parties reflecting the parties' responses to the case evaluation, revealing that plaintiff and Ochelski had accepted the evaluation. But defendant did not step forward at the time to invoke the exclusion. Moreover, in a letter dated April 13, 2006, Ochelski's attorney asked plaintiff's attorney if there was any objection to a proposed judgment on acceptance of case evaluation that was enclosed with the letter, and the letter and enclosures were copied to defendant's attorney. Again, there was no attempt by defendant to invoke the exclusion. Additionally, within the entire case evaluation process itself, defendant was necessarily aware that an evaluation, evaluation responses, and possible settlements and judgments would occur, yet defendant said nothing at the time relative to the exclusion. Rather, defendant thereafter continued to litigate the case, even after the judgment against Ochelski was entered, including agreeing to participate in case facilitation and actively participating in settlement discussions. This goes beyond mere silence and constituted acts and conduct, i.e., actively litigating the claim, from which waiver could and should be inferred. *Angott, supra* at 470. Such conduct, after knowledge of the judgment against Ochelski, cannot be reconciled with an intention to rely on the written consent requirement. We therefore conclude that defendant waived enforcement of the written consent requirement.

In sum, although we conclude that the trial court erred in determining that the written consent requirement was not applicable to plaintiff's settlement with Ochelski, we find that defendant waived that requirement. Thus, we affirm the trial court's decision denying defendant's motion to dismiss because the court reached the right result, albeit for the wrong reason. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

Defendant next argues that the trial court erred in awarding plaintiff prejudgment interest under MCL 600.6013(8). An award of interest under MCL 600.6013(8) is reviewed de novo on appeal. *Angott, supra* at 487.

Defendant argues that plaintiff is not entitled to interest under MCL 600.6013(8) because she failed to timely file a claim for benefits, as required by her policy. Defendant alternatively argues that interest should have been awarded only from June 3, 2006, which is 30 days after it received proof of plaintiff's injuries, not from the date that plaintiff filed her complaint.

Defendant cites no authority for its argument that a plaintiff's alleged failure to comply with a contractual duty may affect entitlement to statutory interest. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). MCL 600.6013(8) clearly and unambiguously provides that interest on a money judgment is to be calculated from the date of filing the complaint. *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005). Thus, the trial court properly awarded interest from October 14, 2005, the date plaintiff filed her amended complaint adding defendant as a party-defendant.

Defendant also argues that the court erred in awarding plaintiff case evaluation sanctions. This Court reviews de novo the interpretation and application of MCR 2.403, *Allard v State Farm Ins Co*, 271 Mich App 394, 397; 722 NW2d 268 (2006), but reviews a trial court's decision whether to apply the "interest of justice" exception in MCR 2.403(O)(11) for an abuse of discretion, *Campbell v Sullins*, 257 Mich App 179, 205 n 9; 667 NW2d 887 (2003).

Defendant argues that the trial court erred in awarding sanctions for costs that were not necessitated by defendant's rejection of the case evaluation. MCR 2.403(O)(6) permits an award of reasonable attorney fees for services necessitated by a party's rejection of the case evaluation. *Young v Nandi*, 276 Mich App 67, 87; 740 NW2d 508 (2007). There must be a causal nexus between rejection and the incurred expenses to justify the award of case evaluation sanctions. *Allard, supra* at 402.

Plaintiff submitted detailed records of the expenses incurred after case evaluation. The trial court examined plaintiff's records and refused to award sanctions for time spent settling the claim against Ochelski, for services during the initial review and correspondence regarding plaintiff's acceptance of the case evaluation, and for an entry that the court found to be duplicative. The court found that for the balance of the listed services, there was a causal nexus between the incurred expenses and defendant's rejection of the case evaluation. We find no error in the trial court's award.

Finally, we find no merit to defendant's argument that the trial court should have declined to award case evaluation sanctions in the interests of justice. The "interest of justice" exception in MCR 2.403(11) should be invoked only in "unusual circumstances." *Harbour v Correctional Medical Services, Inc*, 266 Mich App 452, 466; 702 NW2d 671 (2005). The record does not support defendant's argument that plaintiff engaged in gamesmanship, or that other unusual circumstances existed to justify application of the "interest of justice" exception. Thus, the trial court did not abuse its discretion in refusing to apply that exception.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ William B. Murphy
/s/ Stephen L. Borrello